No. 89-645

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL MILKOVICH, SR.,

Petitioner,

against

THE LORAIN JOURNAL CO., THE NEWS HERALD and J. THEODORE DIADIUN,

Respondents.

On Writ Of *Certiorari* To The Supreme Court Of The State Of Ohio

MOTION OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF OHIO, *et al.*, FOR LEAVE TO FILE BRIEF, WITH BRIEF *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

HENRY R. KAUFMAN
404 Park Avenue South
New York, New York 10016
(212) 889-2308
Attorney for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

The proposed amici curiae* respectfully move this Court, pursuant to Rule 37, for leave to file the attached brief in support of Respondents, urging affirmance of the judgment below. The parties' consent to file was requested but has been refused.**

The amici include individuals and non-profit, charitable or civic groups, some of which have at times been

---

* The amici curiae are listed and described in an Appendix to the accompanying brief.

** The parties apparently agreed to limit their consents to two amici briefs on each side. Amici believe their brief will not be duplicative of the interests or positions of any other amicus before the Court, including those to whom the parties had earlier given their consent.

classified as "non-media"* for purposes of defamation litigation. These groups and their members, as all speakers "media" and "non-media" alike, desire freely to express their opinions on matters of public concern. Amici ACLU and ACLU of Ohio provide counsel and support for the rights of non-media speakers and groups in defamation actions.

Amici seek leave to file their brief in order to urge the Court to implement broad and effective constitutional protection under the First Amendment for

---

* In accepting this terminology as a shorthand description amici should not be understood as subscribing to the notion that distinguishing between "non-media" and "media" libel defendants justifies according lesser rights to non-media defendants. At a minimum, all speakers are entitled to equal constitutional protection for expression of ideas, beliefs and opinions.

expression of ideas, beliefs and opinions -- however unpopular, irritating or even "false" and "harmful" they may be found to be by potential libel plaintiffs, or by triers of "fact" sitting in judgment upon them. In this the non-media amici fully share and support the interests of media libel defendants, including the Respondents.

However, amici also wish to emphasize the vital need to protect opinions of citizen speakers as potential libel defendants. Prior pronouncements by the Court regarding the rights of non-media libel defendants have been at best inconclusive.* It is amici's position

---

* Compare Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979); and Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986), with Dun & Bradstreet, Inc., 472 U.S. 749, 782-84 (1985) (Brennan, J., dissenting); id. at 773 and n.4 (White, J., concurring); and Philadelphia Newspapers, Inc., supra, 475 U.S. at 780 (Brennan, J., concurring).

that those rights can and should be fully recognized by this Court in any decision addressing the scope of the opinion privilege.

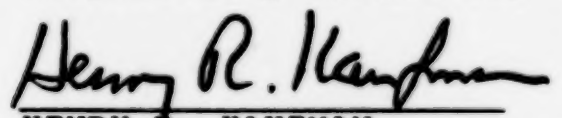
Amici's proposed brief therefore examines why the pending appeal is not -- and must not be perceived to be -- an occasion simply to consider mere technicalities of libel law as applied to "media" defendants. Protection for ideas, beliefs and opinions lies at the very heart of our Constitution's guarantee of free expression for all persons under the First Amendment. These vital rights know no distinction between types of speakers -- media or non-media, public or private.

The brief amici seek leave to file presents facts that parties to a media-based action may well not explore, regarding the all-too-frequent use of

libel litigation to suppress or chill citizen expression, and the consequent need to protect opinions of non-media speakers. The brief also addresses aspects of the legal issues that may not be separately examined by the parties or other amici.

Accordingly, the proposed amici curiae request leave to file the attached brief, representing the interests of non-media libel defendants and supporting affirmance of the judgment below.

Respectfully submitted,



HENRY R. KAUFMAN
Attorney for Amici Curiae
404 Park Avenue South
New York, New York 10016
(212) 889-2308

April 6, 1990

NO. 89-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL MILKOVICH, SR.,

Petitioner,

- against -

THE LORAIN JOURNAL CO., THE NEWS HERALD
and J. THEODORE DIADIUN,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

BRIEF, AMICI CURIAE, OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF OHIO, et al., IN SUPPORT OF RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Articles and Other Authorities

Preliminary Statement

In 1974 Justice Powell put into words surely one of the bedrock principles of our constitutional system for the protection of human dignity, personal liberty and freedom of expression:

> "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

Since then" this Court has left state and lower federal judges free to develop, now to the point of near universal recognition, the logical and, amici submit, inevitable corollary of the Gertz "dictum" -- viz., a constitutionally-based, absolute privilege against libel claims for statements of "opinion."

During those same years, unfortunately, plaintiffs have increasingly seized upon libel actions as a means of seeking to suppress, punish or deter what they claimed to be the "false" and "harmful" views of their critics.* Often these plaintiffs are public officials, public figures or powerful corporate interests of various kinds.

Left to defend such claims, not in the free marketplace of ideas but in the costly precincts of libel courtrooms, were not only the commercial media but,

---

* See Lewis, "New York Times v. Sullivan Reconsidered: Time to Return to the 'Central Meaning of the First Amendment'," 83 Colum. L. Rev. 603, 609 (1983) (reflecting upon "a time of growing libel litigation, of enormous judgments and enormous costs ..."); Smolla, "Let the Author Beware: The Rejuvenation of the American Law of

footnote continued --

frequently, individual citizens and organizations -- non-commercial groups often unable to withstand the heavy burdens of libel litigation.*

---

footnote continued from previous page --

Libel," 132 U. Pa. L. Rev. 1 (1983) (noting "a dramatic proliferation of highly-publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money"); L.G. Forer, A Chilling Effect: The Mounting Threat of Libel and Invasion of Privacy Actions to the First Amendment (W.W. Norton 1987).

* See, e.g., non-media libel cases cited in Section II.A. and in the Appendix; see also "SLAPPing the Opposition: How Developers and Officials Fight Their Critics," Newsweek (March 5, 1990) at 22 (discussing an increase in the incidence of "SLAPPs" -- "Strategic Lawsuits Against Public Participation" -- rarely successful suits, often based on questionable libel (or similar) claims, designed to harass, intimidate or shut up individuals and groups that publicly oppose proposals by plaintiffs such as real estate developers, corporations and elected officials); "Defamation Suits 'Chill' Activists: Developers File Against Protestors," National Law Journal (July 25, 1988) (same).

Of major significance in reducing, if not entirely eliminating, the attendant libel chill has been liberal application of an absolute constitutional protection for statements of opinion.

The Court's first consideration of the precise scope and contours of a constitutional privilege for statements of opinion thus comes at a time when continued broad protection is required in order to diminish the chilling effects of these disturbing trends in libel litigation. The seemingly mundane facts of this case, involving one sports columnist's views on the actions of a high school wrestling coach in the State of Ohio, should not be permitted to obscure the critical significance for the broader citizenry of the principles and values here at stake.

Interests of the Amici

The amici, identified and specifically described in the Appendix, are individuals and non-profit charitable or civic groups, some of which have at times been classified as "non-media".*

All of the amici and their members have an interest in speaking out in an opinionated and uncensored fashion on issues of public concern. Several of the amici have been subjected to onerous and intimidating libel suits as a result of their advocacy on such issues. Amici

---

* In accepting this terminology as a shorthand description amici should not be understood as subscribing to the notion that distinguishing between "non-media" and "media" libel defendants justifies according lesser rights to non-media defendants. At a minimum, all speakers are entitled to equal constitutional protection for expression of ideas, beliefs and opinions.

ACLU and ACLU of Ohio have supported individuals and groups in their defense of such suits.

Without broad and effective constitutional protection for ideas, beliefs and opinions the amici -- and all citizens and public-spirited groups -- would be rendered far more susceptible to the chilling effects of this kind of libel litigation.

Summary of Argument

In light of the far-reaching impact of libel claims on the First Amendment rights of all citizens, it would be a mistake for the Court to treat this case as bearing only upon the rights of media libel defendants, or as involving merely a technicality of the law of libel. Broad protection for ideas, beliefs and

opinions is a matter of core constitutional significance with implications well beyond libel litigation against the media. (Point I)

The ideas, beliefs and opinions of all speakers must be protected without regard to the status of the speaker. Putting aside arguably unresolved issues, no distinction should be made between "non-media" and "media" speakers, at least for purposes of constitutional protection for opinion. Non-media speakers are vulnerable to the chill of libel litigation, and lower courts have uniformly made no distinction between media and non-media defendants for these purposes. (Point II)

Finally, while distinguishing "opinion" from "fact" will never be a simple exercise in all cases, acceptance of the principle of broad constitutional

protections for the ideas, beliefs and opinions of all speakers, media and non-media alike, will minimize technical line drawing problems in application of a constitutionally-based opinion privilege. (Point III)

ARGUMENT

POINT I - PROTECTION FOR IDEAS, BELIEFS, AND OPINIONS IS A MATTER OF CORE CONSTITUTIONAL SIGNIFICANCE UNDER THE FIRST AMENDMENT; IT IS NOT A MERE TECHNICALITY OF THE LAW OF LIBEL

This Court has long recognized, in diverse contexts, that the unfettered formation and expression of ideas, beliefs and opinions -- as a central component of individual autonomy -- is a bedrock principle of constitutionally-based liberties under the First Amendment. Constitutional protection

for the autonomy of personal opinion has by no means been confined to libel or media cases. Indeed, well before Gertz this Court had undertaken to vouchsafe such freedom.

It was 1919 when Justice Holmes expressed his concerns, in a federal espionage act case, over "[p]ersecution for the expression of opinions ... that we loathe" and articulated the constitutional preference for "free trade in ideas" as the best means to ultimate good and truth. Abrams v. United States, 250 U.S. 616, 630-31 (1919) (dissenting opinion).

Justice Brandeis, in 1927, extended these observations in a case involving enforcement of a state "criminal anarchy" statute noting, in words whose closing phrases are only much later echoed in Gertz, that "those who won our

independence ... valued liberty both as an end and a means ... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth...; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." Whitney v. California, 274 U.S. 357, 375-76 (1927).*

These eloquent formulations were later translated into remedies against the suppression of ideas, beliefs and opinions well before this Court had even

---

* Cf. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting) ("The makers of our Constitution ... sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.").

begun to inject First Amendment considerations into the common law of libel. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), the Court protected the right of Jehovah's Witnesses not to participate in compulsory flag salutes and pledges of allegiance, not on grounds of the free exercise of religion, but on a broad reading of First Amendment rights of free expression and the manner in which they militate against "compulsory unification of opinion." As Justice Jackson explained:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox ... in ... matters of opinion."

And three years before Gertz, in Cohen v. California, 403 U.S. 15 (1971), the Court overturned a disturbing the peace conviction of a war protestor who

had worn a jacket embroidered with a "scurrilous epithet" into a municipal court building. Justice Harlan observed that "[t]he constitutional right of free expression ... put[s] the decision as to what views shall be voiced largely in the hands of each of us ... in the belief that no other approach would comport with the promise of individual dignity and choice upon which our political system rests." Id. at 24. See also Tinker v. Des Moines Indep. Comm. School District, 393 U.S. 503 (1969) (barring the state from "prohibition of a particular expression of opinion" by student protestors wearing armbands even in the restrictive setting of a public high school); Stanley v. Georgia, 394 U.S. 557, 566 (1969) (in a possession of obscenity case, finding it "wholly inconsistent with the philosophy of the

First Amendment" for the state to exercise "the right to control the moral contents of a person's thoughts").

This history makes clear that Gertz did not write on a clean slate. Nor did the principle that ideas, beliefs and opinions must be protected under the First Amendment spring solely from a reading of the law of libel. To the contrary, it flowed naturally from fundamental principles of our constitutional system and core values of the First Amendment.

Even after Gertz the Court continued to embellish upon the theme of expansive constitutional protection for ideas, beliefs and opinions, although this Court has not until today had occasion to flesh out the full implications of these principles for its post-New York Times v. Sullivan view of the protection

of opinion in libel actions.*

Thus, in Wooley v. Maynard, the Court recognized that the right to express one's own beliefs or refrain from expressing another's were "components of the broader concept of 'individual freedom of mind'," 430 U.S. 705, 714 (1977), so that forcing car owners to display a state motto on a license plate "invades the sphere of intellect and spirit." Id. at 715 (citation omitted).

---

* The Court, of course, had also bumped up against the opinion issue, or commented on constitutional protection for opinion, in others of its post-Sullivan libel opinions. See Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6 (1970) (holding use of the term "blackmail" as a "vigorous epithet" non-actionable); Old Dominion Branch No. 496, National Assn. of Letter Carriers v. Austin, 418 U.S. 264 (vigorous epithets in the context of a labor dispute not actionable, citing Gertz); Curtis Publishing Co. v. Butts, 388 U.S.

footnote continued --

Likewise, in Board of Education v. Pico, 457 U.S. 853 (1982), the school library censorship case, the plurality relied upon Barnette in finding that the First Amendment precludes a school board from engaging in the "official suppression of ideas." Id. at 871 (emphasis in original).

More recently the Court articulated the importance of constitutional protection for opinions, beliefs and ideas in the context of suits for product disparagement and intentional

---

footnote continued from previous page --

130, 149 ("The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'inalienable right'") (opinion of Harlan, J.). Indeed, New York Times Co. v. Sullivan itself had commented upon the issue -- e.g., observing that the First Amendment "was fashioned to assure unfettered interchange of ideas," citing Roth v. United States, 354 U.S. 476, 484 (1956) -- 376 U.S. 254, 269 (1964).

infliction of emotional distress.

In Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503-04 (1984), Justice Steven's opinion for the majority noted that:

> "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole."

The Court went on to quote the Gertz dictum in distinguishing between, on the one hand, ideas and opinions which are protected as part of the "freedom to speak one's mind" from, on the other hand, the type of speech (viz., false and defamatory statements of fact) "to which the majestic protection of the First Amendment does not extend." Id.

And in Hustler Magazine v. Falwell, 485 U.S. 46 (1988), Justice Rehnquist

eloquently observed for himself and seven other Justices that:

> "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern... We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a 'false' idea." Id. at 50 (citations omitted).

In sum, the core constitutional principle of absolute protection under the First Amendment for ideas, beliefs and opinions, derived from basic concepts of the personal autonomy of the individual as well as from the utilitarian goal of advancing political democracy and the quest for "truth" in the marketplace of ideas, actually long predated the Court's more particular efforts to protect expression from the chilling effects of libel claims.

Protection for beliefs and opinions as a component of personal autonomy is thus the broader value from which the lesser (albeit greatly important) necessity of a constitutional privilege for statements of opinion in libel actions is logically derived.

It is also apparent that these seminal principles provide no basis whatever for distinguishing among participants in the system of freedom of expression, according to labels such as "media" or "non-media," for purposes of constitutional protection for opinion.*

Moreover, however "rich" or "complex" was the history of common law protection for the far more limited range of statements deemed to be "fair

---

* This is so whether or not there is any basis for distinguishing between such speakers for other purposes of libel law -- see Point II, infra.

comments" -- encrusted as that protection was in restrictions flowing not from first constitutional principles but from the tortured logic and developmental peculiarities of libel as a strict liability tort -- the common law tradition can hardly be viewed as controlling or defining the limits of available protection under the First Amendment. To accept that proposition would be to permit the common law tail to wag a constitutional elephant.

In any event, the foregoing should suffice to demonstrate that there has also been a long and venerable history of recognition for the pre-eminent principle of constitutional protection for ideas, beliefs and opinions which -- in competition with a less protective common law tradition already

substantially undermined by New York Times v. Sullivan -- must surely prevail.

POINT II - IDEAS, BELIEFS AND OPINIONS OF ALL SPEAKERS MUST BE PROTECTED, WITHOUT REGARD TO THE STATUS OF THE SPEAKER

A. "Non-media" Speakers Are Vulnerable to the "Chilling Effects" of Libel Litigation; Broad Constitutional Protection for Statements of Opinion Is Needed in Order to Reduce the Chill

For more than twenty-five years now, since New York Times v. Sullivan, supra, this Court has recognized that libel claims can have a "chilling" effect on the exercise of First Amendment rights. Non-media defendants are particularly vulnerable to the chill of libel litigation or the threat of litigation. Such individuals and groups, like many of the amici herein, are financially unable to risk or withstand the costs

and burdens of defending such claims. Unlike media publications, non-media speech rarely produces profits that can be used to pay for the defense of resulting libel claims. Non-media speakers do not normally purchase insurance to cover libel litigation, or consult lawyers to review their intended statements prior to publication. Nor do non-media speakers generally undertake to tone down robust and opinionated expression for the sole purpose of avoiding libel claims -- nor should they be required to do so in a free society.

In order to reduce the chilling impact of libel claims the Court has previously required proof of a higher degree of fault in many cases. But stricter fault standards, even when vigorously enforced, have not been fully effective in deterring costly libel

libel litigation. In a growing number of cases recognition of a constitutional opinion privilege has become an integral and indispensable aspect of defending First Amendment values in modern libel actions, supplementing if not at times supplanting the New York Times and Gertz fault standards. Indeed, it is certainly fair to say that the constitutional opinion privilege, widely recognized and enforced in the state and lower federal courts, is today one of the most effective bulwarks against intimidating libel claims.

Although many more instances could be cited, the following are but a few examples of libel claims asserted against non-media defendants, where liberal application of a constitutional privilege for statements of opinion was (or could have been) instrumental in

disposing of the claims, thus reducing their chilling effects on the legitimate exercise of First Amendment rights in the free and robust discussion of matters of public concern*:

. In Lukashok v. Concerned Residents of North Salem, 15 Med. L. Rptr. 1965 (N.Y. West. Co. 1988), a citizen's group, in its newsletter to association members, labelled plaintiff, a developer whose proposed hotel had been disapproved by the Town Board, as employing "terrorism" for having sued not only the Town Board to reverse its decision, but every member of the voluntary Board in his or her individual capacities. When the plaintiff brought a libel action against the association (and individual officers), the court was able to grant defendants' motion to dismiss, without costly discovery, based on the principle of constitutional protection for opinion and hyperbole.

---

* The Court is also respectfully referred to the Appendix for descriptions of a number of the amici who have also been subjected to intimidating libel claims, and who have -- or should have -- been protected by recognition of broad constitutional protection for opinion.

. In Karnell v. Campbell, 501 A.2d 1029 (N.J. Super. A.D. 1985), four individuals, private citizens, wrote letters to the editor strongly criticizing plaintiff, the developer of former public property, for having, among other things, "raped" the town. Plaintiff's libel action against the letter writers was dismissed on opinion grounds, with the court commenting that "the citizens of our state must be free, within reason, to speak out on matters of public concern ... we are concerned with the chilling effect that plaintiff's lawsuit ... may have on other citizens who would ordinarily speak out on behalf of what they perceive to be the public good." Id. at 1036.

. In Kotlikoff v. Community News, 89 N.J. 62, 444 A.2d 1086 (N.J. 1982), a private citizen, in a letter to the editor of a small local weekly newspaper, who expressed concern over what he labelled a "conspiracy" and "huge coverup" by the town mayor and tax collector in connection with a decline in delinquent tax receipts, was sued by the mayor (along with the newspaper and several of its principles) for libel. Although the trial court granted summary judgment, the state appellate division reversed on the ground that the letter could be read as charging a "criminal conspiracy." The New Jersey Supreme Court reversed the appellate court, holding that the charges amounted to loose, rhetorical hyperbole to be protected broadly as opinion and emphasizing the importance of prompt

disposition of such claims in order to protect the authors and publishers of commentary on public issues in letters to the editor -- one of the few remaining "outlets" for public debate in an age without "village squares" and "town meetings."

. In Stevens v. Tillman, 661 F. Supp. 702 (N.D. Ill. 1986), aff'd, 855 F.2d 394 (7th Cir. 1988), cert. denied, 109 S. Ct. 1339 (1989), individual black parents active in the local community labelled the white principal of a primarily black school a "racist" in flyers circulated in the community and in statements before the Board of Education. The principal, who was thereafter removed and transferred, sued for libel (and other unrelated claims). The district court granted a directed verdict for the defendants on some of the libel claims on the basis of constitutional protection for opinion; however, other statements the court found to have greater "factual" content were tried to verdict, with the jury ultimately awarding plaintiff a judgment for $1.00 on those claims. The Seventh Circuit upheld the directed verdict entered on the statements of opinion and affirmed the $1.00 judgment on the ground that any factual statements found to be false could not have caused significant harm

once the stronger opinions were found non-actionable.*

. In Immuno AG v. J. Moor-Jankowski, 74 N.Y.2d 548, 549 N.Y.S.2d 938 (N.Y. 1989), aff'ing, 145 A.D.2d 114, 537 N.Y.S.2d 129 (N.Y. App. Div. 1st Dept.), the head of a private, non-profit association active in the field of animal protection wrote a letter to the editor of a scientific journal complaining about the plans of an Austrian company to establish a research facility in a West African

---

* While the result in Stevens seems largely unobjectionable, amici note with concern a process that consumed several years of costly litigation, despite the fact that the central concerns expressed by the black parents were ultimately held to be opinions subject to absolute constitutional protection. A result more likely to reduce the chilling effects of such claims would have been an early dismissal on the ground that any false factual statements were incidental to the gist and sting of the protected opinions. See Immuno AG, supra, this page: "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion' loses sight of the objective of the entire exercise, which is to assure that -- with due regard for the protection of individual reputation -- the cherished constitutional guarantee of free speech is preserved." 549 N.Y.S.2d at 944.

country with access to native chimpanzees, recognized as "endangered" under international wildlife protection treaties, whose effect would be "getting round" the treaties' ban on the extra-national movement of endangered species and going beyond "legitimate requirements" for use of chimps in medical research. The company's libel action against, inter alia, the letter's author, and the journal's editor and publisher, alleged that the letter accused it of "illegally" violating the treaties and of unethical behavior that would damage its reputation in the scientific community. After several years of costly litigation and discovery, and the rejection of a defense motion for summary judgment in the trial court, the New York Appellate Division reversed and dismissed the complaint, in large part based on constitutional protection for opinion, combined with a finding that any incidental facts stated were true. The Court of Appeals affirmed, but not before all but one of the defendants had settled, or been forced to settle, with the plaintiff for "'substantial sums,' ... for the obvious reason that the costs of continuing to defend the action were prohibitive." 537 N.Y.S.2d at 138.*

---

* In rejecting the opinion defense in Immuno AG the trial court had held that "to endow the [letter's] factual charges

footnote continued --

B. Lower Courts Have Uniformly Made No Distinction Between Libel Defendants for Purposes of the Protection of Opinion

This Court has seemingly left open the possibility of an operative distinction between media and non-media libel defendants for certain purposes, such as the extent of application of fault standards in constitutionally-based libel actions. See Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979) (leaving open question of application of

---

footnote continued from previous page --

with the cloak of opinion" would be "playing a game of semantics." In rejecting this reasoning and finding the letter to consist substantially of protected opinion, the Appellate Division eloquently observed: "It must not be forgotten that in articulating the boundaries separating fact from opinion courts concern themselves not with a narrow semantic inquiry but with one having a profound constitutional dimension; we determine no less than what may and, to a degree, what may not be freely said." 537 N.Y.S.2d at 134-35.

"actual malice" standard to "individual defendants" as opposed to "media defendants"); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986) (reserving on the media/non-media question for purposes of burden of proof on the issue of falsity in a private-figure libel action").

---

* With respect to burden of proof, a strong argument can be made that constitutional protection for opinion necessarily follows from this Court's prior recognition in Hepps that New York Times v. Sullivan requires both public and private libel plaintiffs to carry the burden of proving the existence of a false statement of fact. If the Court were to accept that reasoning, it does not follow, however, that the Court's reservation in Hepps on the non-media issue dictates a similar reservation for purposes of a constitutional opinion privilege. As demonstrated throughout this brief, there are many reasons, quite apart from the question of a libel plaintiff's burden of proving falsity, for recognizing First Amendment protection for opinion and for applying this protection equally to non-media and media defendants. In any event, to the

footnote continued --

Despite these explicit reservations, no lower court of which amici are aware has ever drawn a distinction between media and non-media libel defendants for purposes of constitutional protection for opinion. Indeed, the presumption of equal protection has been so consistent that the arguable distinction has almost never even been discussed for these purposes.

Courts have thus consistently accorded equal constitutional protection to the opinions of non-media speakers where such speakers have been joined as defendants with media defendants in the same action. In these cases, of course,

---

footnote continued from previous page --

extent that the choice is perceived as either limiting the Hepps reservation or rejecting equal protection for opinion, clearly the proper choice is to limit Hepps rather than further truncate or confuse the rights of non-media speakers under the First Amendment.

the anomoly of treating otherwise similarly-situated defendants unequally would be most apparent.*

---

* See, e.g., Stones River Motors, Inc. v. Mid South Publishing Co., 651 S.W.2d 713, 722 (Tenn. App. 1983) (constitutional opinion privilege extended both to private-citizen author of letter to the editor and newspaper which published an unedited version of the letter, for statements describing plaintiff's business transactions as a "rip off" and "highway robbery"); Pease v. Telegraph Publishing Co., Inc., 426 A.2d 463 (N.H. 1981) (constitutional opinion privilege applied both to private-citizen author of letter to the editor and newspaper that published the letter describing plaintiff as "journalistic scum of the earth"); Owen v. Carr, 497 N.E.2d 1145 (Ill. 1986) (constitutional opinion privilege extended to an attorney as well as national legal periodical, its publisher and a reporter, for allegedly defamatory statements made by the attorney and quoted in an article published in the periodical concerning the professional integrity of another attorney); Rand v. New York Times Co., 6 Med. L. Rptr. 1692 (N.Y. App. Div. 1st Dept. 1980) (constitutional opinion privilege applied to singer-celebrity in connection with statements made to, and later published in altered form, by the newspaper).

Even in cases where media defendants or a media publication were not involved, and thus no disparity of treatment would immediately be presented, courts presented with the opinion defense have nonetheless uniformly accepted non-media defendants' claims for constitutional opinion protection.*

---

* See, e.g., Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) (constitutional opinion privilege applied to business corporation whose allegedly defamatory statements regarding the plaintiff manufacturing company, which had employed the defendant to market its products, were published in an industry news journal); Potomac Valve Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987) (article by business competitor criticizing competitor's product test design as "very poor" and "designed to snow the customer" held subject to constitutional opinion privilege); Della-Donna v. Yardley, 512 So.2d 294 (Fla. App. 4 Dist. 1987) (constitutional opinion privilege extended to private-citizen author of a letter to the editor (publisher not named as defendant) for

footnote continued --

Finally, in the one case found where the issue was expressly discussed, the court in an extended and learned opinion held that protection for statements of opinion should not depend on the media status of the libel defendant, indeed not even in a libel action involving

---

footnote continued from previous page --

allegedly defamatory statements concerning plaintiff attorney without discussion of defendant's non-media status); Erven v. Provost, 413 N.W.2d 861 (Minn. App. 1987) (constitutional opinion privilege extended to insurance company whose letter to the editor of a local newspaper labelled as "senseless dribble" plaintiff-citizen's prior letter to the editor that had criticized the Minnesota Insurance Industry); Levittown Norse Associates v. Joseph P. Day Realty Corp., 541 N.Y.S.2d 421 (N.Y. App. Div. 1st Dept. 1989) (constitutional opinion privilege applied to real estate broker whose allegedly defamatory statements regarding a property owner were published in an article appearing in a local newspaper); Sall v. Barber, 782 P.2d 1216 (Col. App. 1989) (letter to the editor authored by private citizen, describing plaintiff as a "bigot," held to be non-actionable expression of opinion with no discussion of author's non-media status).

what that court viewed as matters of "private" concern. Henry v. Halliburton, 690 S.W.2d 775 (Mo. 1985)(en banc).*

To the extent they have accorded protection to the opinions of all speakers under a constitutional opinion privilege, lower courts have in fact not

---

* For purposes of this action, as well as for purposes of the kinds of public interest statements which are of the greatest concern to these amici, the Court need not necessarily here address or resolve the issue of opinion protection in cases involving purely private libels, in whatever fashion such private libels may be defined. However, whatever may be the ultimate resolution of all aspects of the question of constitutional libel standards as applied to such private libels, it would seem safe to say that constitutional protection for opinion, involving as it does pervasive aspects of individual self-expression and autonomy (see Section I, supra), would appear to be the aspect of these issues least appropriately subject to distinctions between "public" and "private" publications. With this the American Law Institute agrees. Restatement (Second) of Torts Sect. 566, comment c (1977).

moved beyond the situation as it existed under the common law of fair comment. At common law, "everyone ha[d] the right to comment on matters of public interest." Hallen, "Fair Comment," 8 Tex. L. Rev. 41 (1924); accord, Thayer, "Fair Comment as a Defense," Wisc. L. Rev. 286, 291 (1950-51) ("[f]air comment on the other hand is open to every member of society"). As Thayer noted, "one need not be an expert in a field to express his opinion." Id.

C. At Least for Purposes of A Constitutional Opinion Privilege, This Court Has Never Made a Distinction Between "Non-media" and "Media" Speakers

Although this Court has left open the possibility of a media/non-media dichotomy for certain other purposes in libel cases (see Point II.B., supra), the Court has never held or intimated that

such a distinction would be appropriate with regard to constitutional protection for ideas, beliefs and opinions. As noted in Point II.A., supra, the Court's general views on the matter of constitutional protection for opinion have always been framed in the broadest terms.

Moreover, one of the libel cases often cited as providing some support for a constitutional opinion privilege, Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974), protected the speech of non-media defendants on grounds at least undergirded by the Gertz dictum that "there is no such thing as a false idea," id. at 284.*

---

* While decided in the context of a labor dispute, it is clear that Letter Carriers, decided on the same day as Gertz, was

footnote continued --

The epithets in Letter Carriers, which the Court found could not constitutionally support a libel judgment, were clearly statements of opinion. And no question was raised as to the applicability of constitutional libel standards under the New York Times v. Sullivan line of cases.

POINT III - WHILE SEPARATING "OPINION" FROM "FACT" MAY NEVER BE SIMPLE IN ALL CASES, RECOGNIZING THE PRINCIPLE OF BROAD CONSTITUTIONAL PROTECTION FOR THE IDEAS, BELIEFS AND OPINIONS OF ALL SPEAKERS WILL MINIMIZE PROBLEMS OF LINE DRAWING

The difficulty in the closest cases of distinguishing between statements of "fact" and those of "opinion" has for

---

footnote continued from previous page --

premised on constitutional considerations. The Letter Carriers Court did not rely on the non-constitutional, federal "pre-emption" approach to libel in the labor context formulated in Linn v. Plant Guard Workers, 383 U.S. 53 (1966).

decades been the stuff of extended judicial and academic discussion. Compare Pearson v. Fairbanks Publishing Co., 413 P.2d 711, 714 (Alaska 1966) ("the distinction between a fact statement and an opinion or comment is so tenuous in most instances, that any attempt to distinguish between the two will lead to needless confusion"), with A.S. Abell Co. v. Kirby, 227 Md. 267, 176 A.2d 340, 343 (1962) (the distinction is "theoretically and logically hard to draw" but "usually reasonably determinable as a practical matter").

That these at times daunting difficulties were also unavoidably confronted when applying the common law's fair comment privilege, see Note, "Fair Comment," 62 Harv. L. Rev. 1207, 1212 (1949) (observing that the distinction between fact and opinion for fair comment purposes had been "more

announced than defined"); PROSSER ON TORTS (3rd ed., 1964) (the distinction "has proved to be a most unsatisfactory and unreliable one, difficult to draw in practice"); 1 F. Harper & F. James, TORTS Sect. 5.28, at 458 (1956), is proof enough that concerns over line drawing should have no bearing on the question of constitutional protection, vel non, for statements of opinion.

The issue of line drawing is, however, highly pertinent to the vitally-important matter of assuring that constitutional protection for ideas, beliefs and opinions will be broad enough to accord meaningful coverage -- that can be effectively applied from the earliest stages of the litigation -- to all speech that ought fairly to receive protection under an expansive view of the First Amendment.

No useful purpose would here be

served for amici to attempt to formulate a single, all-purpose test that miraculously would resolve all of the legendary difficulties of line drawing that are implicit in the unavoidable task of separating constitutionally-protected opinion from unprotected and potentially actionable statements of fact. The many generations of the common law's struggle with this task, and the fifteen or so years of similar judicial analysis for purposes of a First Amendment privilege, have not yielded such a magical formula. Indeed, it is to be doubted that any test will ever be crafted that can eliminate the need for a sensitive case-by-case approach to these matters. Nor is it probable that any single formula will ever work perfectly in separating opinion from fact in all cases.

This is not to say that the Court

today writes on a clean slate for these purposes. Many sensitive and learned opinions on the subject have been handed down over the years and there is much wisdom to be gleaned from the prior experience of courts and commentators in this area. In amici's view, the most useful and effective tests have been those that do not "lose sight" -- as one court has well described it -- of "the objective of the entire exercise," Immuno AG v. J. Moor-Jankowski, supra, 549 N.Y.S.2d at 944 (N.Y. Court of Appeals); and, as the lower court in that case wisely observed:

> "It must not be forgotten that in articulating the boundaries separating fact from opinion courts concern themselves not with a narrow semantic inquiry but with one having a profound constitutional dimension; we determine no less than what may and, to a degree, what may not be freely said." Id., 537 N.Y.S.2d at 129 (App. Div. 1st Dept.)

For such purposes we commend to the Court's attention the extended discussion of these issues, and the varying but not entirely dissimilar approaches taken, and standards applied, focusing on the "totality of circumstances" of the publication, in the following cases*: Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 427 U.S. 1127 (1985) (opinions of Starr, J. and

* One other oft-cited formulation, propounded by the American Law Institute in its Second Restatement of Torts, Sect. 566 (1977), is in amici's view unduly restrictive. Requiring, as it does, a speaker either fully to state the facts upon which her opinion is based, or to be subject to a potentially elaborate post-hoc assessment of "facts" known to the audience or "implied" by the opinion, the Restatement approach fails to take into account the behavior of opinionated speakers who cannot be expected meticulously to set forth each of the factual bases for their opinions in the course of what are often passionate or emotional presentations. Moreover, the Restatement test has a tendency to lead courts inappropriately to embark upon a myopic and open-ended search for such undisclosed facts or unstated implications, to the detriment of free expression.

Bork, J.); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980); Cole v. Westinghouse Broadcasting Company, 386 Mass. 303, 435 N.E.2d 1021, cert. denied, 459 U.S. 1037 (1982); Potomac Valve Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987) (Wisdom, J.); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc), cert. denied, 479 U.S. 883 (1986). See generally, R.A. Smolla, Law of Defamation, Sect. 6.01 et seq. (Clark Boardman 1986, 1990). But see Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988) (Easterbrook, J.) (questioning whether any test can meaningfully delineate between the philosophically elusive if not indistinguishable concepts of "fact" and "opinion," while nonetheless emphasizing the need broadly to protect free expression whatever test may be applied).

From these cases can be distilled certain minimum standards that, amici submit, ought to characterize any constitutionally-adequate test for separating fact from opinion:

-- The statements must be assessed based on a sensitive evaluation of their meaning, in the context of the publication taken as a whole, and in consideration of all of the surrounding circumstances of their publication.

-- No test for separating fact from opinion should be mechanically applied; the object of the search is not simply to identify any incidental "factual" statements, but rather to assess whether, in the overall context, any identified factual misstatements are merely incidental to the opinionated thrust of the entire publication.*

-- The requisite sensitive and thoroughgoing contextual evaluation must be made as a matter of law by the Court in the first instance.

---

* See Potomac Valve, supra, 829 F.2d at 1288-90; Immuno AG, supra, 549 N.Y.S.2d at 944 (warning against "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion'").

-- Consideration of the opinion defense should be made at the earliest possible stage of the litigation in order to facilitate dismissal or summary judgment in all appropriate cases.

-- In close cases, the court must err on the side of free expression.*

-- Because the opinion privilege is an issue of constitutional dimension, appellate courts must make their own independent review of all judgments that sanction speech where a claim for constitutional protection of opinion had been asserted.**

---

* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 376 ("... when the scales are in ... an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting ... speech); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), cert. denied, 434 U.S. 834 (1977) ("Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of speech").

** This Court has previously exercised independent appellate review in cases that have been disposed of on grounds akin to opinion -- see, e.g., Greenbelt Cooperative Publishing Assn. v. Bresler,

footnote continued --

-- Any test adopted should give clear guidance to speakers as well as to the state and lower federal courts that must properly apply it in order to protect delicate constitutional rights.*

* * * *

In the end a court must always keep clearly in mind that what is at stake here is no less than the rights of all citizens -- non-media and media alike --

---

footnote continued from previous page --

supra, 398 U.S. 6; Old Dominion Branch No. 496, National Assn. of Letter Carriers v. Austin, supra, 418 U.S. 264. To the extent a constitutionally-erroneous judgment, improperly rejecting the assertion of an opinion privilege, is based on a finding of "actual malice," independent review would in any event clearly be required. Amici are here suggesting the additional point that in any action, brought by a "public" or "private" plaintiff, against a "media" or "non-media" defendant, the denial of a claim of opinion privilege is a ruling of constitutional dimension that must be independently reviewed.

* See Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678, 2695 (1989) ("uncertainty with respect to the scope of constitutional protection can only dissuade protected speech ...").

to speak their minds freely in a free society under the First Amendment.

Conclusion

For all the foregoing reasons the Court should embrace, and assure the broad and effective application of, an absolute constitutional privilege for the ideas, beliefs and opinions, of all citizens and groups, in libel as in all other First Amendment cases. Because the court below applied a proper standard, and reached a result appropriately protective of First Amendment rights, the judgment of the Court below should be affirmed.

Respectfully submitted,

Henry R. Kaufman
Attorney for Amici Curiae
404 Park Avenue South
New York, New York 10016
(212) 889-2308

April 6, 1990

APPENDIX

The Amici

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with 275,000 members dedicated to preserving the principles embodied in the Bill of Rights. Throughout its 70-year history, the ACLU has consistently argued that the right to criticize public officials lies at the heart of self-government and the First Amendment. The interpretation of this nation's libel laws is therefore a matter of vital importance to the ACLU, which has appeared before this Court on numerous occasions, both as direct counsel and amicus curiae. The ACLU and many of its local affiliates have had occasion to counsel or defend actual or potential "non-media" libel defendants, including individuals and non-commercial citizen groups or organizations.

The American Civil Liberties Union of Ohio is one of the ACLU's statewide affiliates, active in the state in which the case now before the Court was litigated.

David and Delores Friedlander have been either officers or members of the 1781 Riverside Drive Tenants Association and have also, for many years, been active in tenant organizing efforts in the New York City area. In 1986 and 1987 the Friedlanders were twice sued for libel (and related claims) by their landlord, based on communications made to other tenants, to official building

inspectors, and on a radio talk show, including alleged statements to the effect that in the Friedlander's view their landlord was "harassing" tenants by pursuing legal claims against them. The two suits are still pending. As a result of these suits the Friedlanders' tenant organizing activities have been diverted, at least to some extent, by the need to assist in the defense of these actions and to raise funds to defray the heavy costs of their defense.

Friends and Relatives of the Institutionalized Aged, Inc. (FRIA) is a non-profit consumer advocacy group formed in 1976 in the aftermath of investigations in New York State of abuses and frauds in the nursing home industry. Last year FRIA looked into the activities of one nursing home in New York City in response to complaints from nursing home employees, patients and family members about conditions in the home. A FRIA representative joined in an inspection of the home conducted by investigators of the New York State Health Department. The FRIA representative reported to the press that the state inspectors found inadequate conditions of care at the home. The nursing home commenced a law suit against FRIA seeking $5 million in damages for libel and other claims. The libel action was subsequently replaced by claims for violations of the nursing home's civil rights and rights under state tort law based on the inspection and the subsequent reporting of its results.

The Glen Oaks Tenants Association is a non-profit corporation representing tenants of the Glen Oaks Village apartment complex in Queens, New York, which houses a total of over 1,000 persons. The purpose of the Association is to improve communication among tenants and between tenants and the community. The Association also represents tenants in general matters involving their landlord and, more recently, in connection with the conversion of Glen Oaks Village into a cooperative residence. During the course of the conversion, a lively and often bitter dispute arose between the tenants and the sponsors of the conversion and the sponsor/owner sued individual tenants, the Tenants Association and its attorney for, among other things, defamation. Glen Oaks Village Owners, Inc., et al. v. Block, et al., Index No. 23866/81 (Sup. Ct. Kings Co.). Included among the statements complained of in the defamation action were references to the complex as a "lemon" and to one of the officers of the landlord sponsor as a "slumlord." The case was ultimately settled by the parties but only after two years of costly and diverting litigation.

The International Primate Protection League (IPPL) is a non-profit organization incorporated in the State of California in 1973. Since 1973, IPPL has worked for the conservation and protection of non-human primates (apes and monkeys) around the world, frequently taking stands on controversial issues

such as wildlife trafficking and care and housing of captive primates. IPPL has 10,000 members in over 60 countries and field representatives in 32 countries in North and South America, Asia, Africa and Europe. In 1984 IPPL's Chairwoman, Shirley McGreal, was sued for libel based on a letter to the editor of a scientific journal -- see Point II.B., supra. Although advised by its counsel that the claims against McGreal had no merit, the insurance carrier of IPPL's association liability insurance policy ultimately insisted on settling the libel action, over McGreal's strenuous objection and without her consent, in order to avoid incurring further costs in the defense of the action.

Dr. Jan Moor-Jankowski, a professor at New York University School of Medicine and director of a research facility at the University's Medical Center, is an authority on the use of primates in biomedical research. Moor-Jankowski has also acted as the (unpaid) editor of a specialized scientific journal called the Journal of Medical Primatology. In 1983 the Journal published a letter to the editor, received from the International Primate Protection League, supra, expressing concerns about a proposal by an Austrian blood products company (Immuno AG) to establish a research facility in West Africa, using wild-captured chimpanzees, an endangered species. Around the same time Moor-Jankowski was also quoted in a British science magazine to the effect that Immuno's proposal represented "scientific imperialism." Immuno

commenced a libel action in New York against Moor-Jankowski -- and others -- in both his ("media") role as editor of the Journal that published the letter to the editor and in his ("non-media") role as an expert scientist quoted in the media. Only after several years of exceptionally contentious and costly litigation and discovery was Dr. Moor-Jankowski's motion for summary judgment granted, based in part on constitutional protection for opinion, in addition to other independent state law grounds, by action of New York's intermediate appellate court, later affirmed by the New York Court of Appeals -- see Point II.B., supra.

New York State Tenant Neighborhood Coalition (NYSTNC) is a New York corporation formed for the purposes of advocating and lobbying on behalf of tenants statewide. It is comprised of about 120 organizations and over 2,000 individuals. NYSTNC often embroils itself on behalf of its members in highly visible and controversial issues affecting tenants, including commenting actively and often critically on the tenant-related actions of public officials and figures as well as private landlords and real estate interests. Members of NYSTNC have reported a dramatically increased incidence of libel suits, or threats of suits, against New York tenants, in what appears to be a strategy by landlords to silence or deter criticism of their activities.

Mike Stein is the co-chairperson of the Metropolitan Council on Housing, Inc. a citywide tenants union in New York City. In 1988 he was named as the defendant in a $5 million libel suit arising out of comments made in a tenants' newsletter in which he characterized the management of a housing complex as "incompetent." The lawsuit was ultimately dropped, but only after a year of costly and diverting litigation.

The Wantagh Woods Neighborhood Association is a non-profit corporation of residents and concerned neighbors in Nassau, Long Island. The Association was formed in 1987 for the purpose of representing its members in opposition to an action by a local developer to purchase a home, knock it down, as well as surrounding trees, subdivide the property and build two homes where there was once only one, which was felt could become a pattern that would ruin their neighborhood. In response to the efforts of the Association, certain individual members were sued for defamation by the local developer. The case is still pending, Terra Homes, Inc. v. Blake and Bressack, et al., Index No. 1563/1988 (Sup. Ct., Nassau County). Among the many efforts of the Association were petitioning local officials, holding candlelight vigils and tying red ribbons around trees. Included among the statements complained of by the developer to be defamatory were statements such as, "This neighborhood will not be Terra-ized;" also, "What they did to that house was "Terra-ble", both referring indirectly to the name of the developer.